82-1747

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

ETHEL HAMILTON, et al

Appellants

vs.

WILFORD STOVER

Appellee

JURISDICTIONAL STATEMENT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

No.

ETHEL HAMILTON, ET AL

APPELLANTS

vs.

WILFORD STOVER

APPELLEE

JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

Ohio Revised Code Section 701.02 provides in part that municipal police officers possess complete immunity from liability for any personal injuries or death caused while operating a motor vehicle in response to an emergency call. As applied in this case does this section operate to deny petitioners life, liberty and property without due process of law and/or deny to them the equal protection of the laws?[1]

[1] The parties to this proceeding are Ethel Hamilton widow of Glen Hamilton and administratrix of his estate, his minor children; Harold, Forrest, Jeanette, and Tonya and the respondent, Wilford Stover.

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III. CONSTITUTIONS AND STATUTES

FEDERAL

STATE

OPINIONS BELOW

The Supreme Court of Ohio did not write an opinion in this case. The decisions of the Court of Appeals of Richland County, Ohio and the Common Pleas Court of Richland County, Ohio are not reported. The Journal Entries from the Supreme Court of Ohio and Opinions in the Court of Appeals and Court of Common Pleas are reproduced in the Appendix beginning at page A-1.

JURISDICTION

This is a wrongful death action brought by the widow and children of Glen Hamilton to redress the damages caused by the negligence of appellee, Wilford Stover, a police officer for the Village of Plymouth, Ohio. Relying upon Ohio Revised Code Section 701.02, the Court of Common Pleas granted summary judgment to appellee dismissing appellant's case without trial. Appellants challenged the constitutional validity of section 701.02, but the court upheld the statute. (February 1, 1982). The Court of Appeals of

Richland County affirmed the dismissal of Appellant's case on October 15, 1982. The Ohio Supreme Court declined to review the case on January 26, 1983. Notice of Appeal was filed in the Richland County Court of Appeals on April 15, 1983. This Court has jurisdiction by virtue of 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

FOURTEENTH AMENDMENT (in pertinent part):

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code Section R.C. 701.02 (in pertinent part):

> Policemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call.

STATEMENT OF THE CASE

The Appellant Ethel Hamilton is the widow

of Glen Hamilton. She sues for herself and his minor children. The appellee was a municipal police officer of the Village of Plymouth, Ohio.

Glen Hamilton was killed on April 15, 1978 while he was turning his automobile into his own driveway at his residence in Plymouth, Ohio. He had gone out shortly before that to pick up a pizza for his family. Upon his return home, he began a proper and lawful lefthand turn into his driveway.

As his automobile began to enter his driveway, but before it left the roadway, he was struck broadside by a vehicle driven by the respondent. The impact drove Mr. Hamilton's automobile sideways many feet and he was killed instantly.

The automobile which struck Mr. Hamilton was driven by appellee Stover who was a village policeman on duty at the time. He was responding to a call for aid from another village policeman. The other policeman was outside the jurisdiction of the Village of Plymouth and was asking for

assistance on a matter which was outside the authority and jurisdiction of the Village of Plymouth, Ohio and outside the authority and jurisdiction of Mr. Stover as a village policeman.

There was an informal practice or custom of Plymouth police officers to answer calls outside Plymouth occasionally. Usually the Plymouth officer would stand by until the proper authorities arrived. However, Stover and others, including the Village Chief, also had been deputized as County Sheriffs in order to be able to take action outside the Village limits.

If this case proceeds to trial, Appellants will prove that appellee was driving his vehicle on the wrong side of the highway, at a speed far in excess of the posted speed limit and without operating the proper warning device as required by Ohio law. In short, appellants expect to prove that appellee operated his vehicle in a manner which was grossly negligent and deliberately indifferent to the safety of other persons

legally upon the highways at the time.

In anticipation that the Ohio courts would hold that Revised Code Section 701.02 completely precluded any action against the appellee, appellants initially brought an action in the U. S. District Court of Northern Ohio. (Case No. C79-177). That Court dismissed appellants' complaint on June 21, 1979. Appellant filed a Notice of Appeal to the Sixth Circuit Court of Appeals which affirmed the judgment of the District Court on November 24, 1980. (Case No. 79-3562). Thereafter, appellant sought review of these decisions in this Court. (Case No. 80-1419).

This Court denied appellants' application for a writ of certiorari. In those federal court actions, appellants sought a determination that a cause of action for negligence could be founded upon 42 U.S.C. 1983 and 28 U.S.C. 1331.

On January 23, 1980 the appellee, Wilford Stover, filed a Complaint in the Richland County

Common Pleas Court against the estate of Glen Hamilton for his damages from the accident.

Appellants filed an answer denying that Glen Hamilton's estate was liable for any injuries to the respondent and counterclaiming for his wrongful death.

On December 31, 1981 appellee filed a Motion for Summary Judgment upon appellants' counterclaim, alleging immunity from suit under Revised Code Section 701.02. Appellants responded by means of brief and affidavits in opposition to the Motion. The appellants promptly argued that Section 701.02 violated the Fourteenth Amendment's guarantees of due process of law and equal protection of the laws. On February 1, 1982 appellee's Motion for Summary Judgment was granted. Appellants' counterclaim was dismissed.

On March 1, 1982 appellants appealed the decision of the Court of Common Pleas to the Court of Appeals of Richland County, Ohio. On October 15, 1982 the Court of Appeals affirmed the Court

of Common Pleas and found that the Section 701.02 was constitutional.

Appellants filed their Notice of Appeal to the Ohio Supreme Court on November 12, 1982. On January 26, 1983 the Ohio Supreme Court without hearing declined to review the appeal of the appellants stating that there was no substantial constitutional question involved.

Appellants have now come to this Court as their last resort seeking review of these decisions by the Ohio courts.

REASONS REQUIRING PLENARY CONSIDERATION

I. THIS COURT'S CONSIDERATION OF OHIO'S FAILURE TO SUPPLY ANY RATIONAL BASIS FOR COMPLETELY DENYING LEGAL REMEDY TO INJURED PERSONS BY GRANTING IMMUNITY WHEN MUNICIPAL, BUT NOT STATE AND COUNTY, EMERGENCY VEHICLES INFLICT SUCH INJURY IS OF MANIFEST IMPORTANCE IN DEVELOPING EQUAL PROTECTION LAW.

Sovereign immunity is an ages old concept, grounded in principles which are inimical to democratic and responsive government. In recognition that modern realities such as insurance and governmental responsibility to citizens have eroded

the archaic concept, the State of Ohio has consented to suit being filed against the State, counties, and municipalities. (Ohio Revised Code, Chapter 2743, effectuating Ohio Constitution Article I, Section 16 which eliminated sovereign immunity by giving state consent to suit.) The Ohio Supreme Court has expressed great distaste for continuing bastions of sovereign immunity. Schenkolewski v. Cleveland Metroparks System, 67 Ohio St 2d 31, 426 NE 2d 784 (1981). This modern trend accentuates the arbitrariness and inequality of the result reached below.

At common law Ohio did not grant immunity to police officers, Lingo v. Hoekstra, 176 Ohio St 417, 200 NE 2d 325 (1964), although the municipalities themselves were immune. However, when the Ohio General Assembly passed Ohio Revised Code Section 701.02, the municipal immunity from suit for vehicular torts was abrogated in all but one instance; to wit, injury caused by a municipal police or fire vehicle while responding to an

emergency call. At the same time, the drivers of such vehicles were also granted immunity in derogation of the common law. Thus, a remedy which once existed and would have been available to appellants was extinguished.

The end result of these actions by Ohio is to create an extremely small class of injured persons who have no legal remedy at all. Appellants are members of this arbitrary class. Simply stated, all other persons injured by any other vehicle and specifically by a police vehicle are afforded a remedy. Thus, persons injured by a municipal police vehicle pursuing a fleeing felon at high speeds are accorded a remedy. Lingo v. Hoekstra, supra. Persons injured by state police and county sheriff vehicles responding to an emergency call are similarly afforded access to the courts to seek a remedy.

Herein, the Appellee police officer was responding to a call which was county, not municipal, in nature and origin, since it involved

events outside the village limits. Yet appellants have been denied any remedy for the death of husband and father simply because the officer was also an on-duty municipal officer still within the village limits at the time his vehicle struck and killed Mr. Hamilton.[2]

Appellant emphasizes to this Court the extremely arbitrary nature of the classification which precludes her from access to justice and remedy. The need for prompt emergency response cannot explain the state's action in exempting only some emergency vehicles from liability. The protection of fiscal integrity of municipalities (although not a claim ever advanced on behalf of the Appellee or the State) is also

[2] In order to avoid the constitutional issue presented here, appellants argued below that appellee should be amenable to suit in his capacity as a deputy sheriff. The Court of Appeals rejected this dual capacity argument, thereby requiring that the constitutionality of Ohio Revised Code Section 701.02 be squarely confronted.

non-rational, since all other municipal vehicular accidents give rise to the potentiality of suit and damages and since municipalities can insure themselves and their employees.

No plausible reason has been advanced for the granting of this type of sovereign immunity in Ohio, and no reason is offered by the Ohio Supreme Court for upholding the grant. McDermott v. Irwin, 148 Ohio St. 67, 73 NE 2d 85 (1947).

Appellant has had significant rights infringed by the operation of Ohio Revised Code Section 701.02, including the right to life, the rights to marriage, a family life, and the right to access to the Courts. U.S. Constitution, Amendment XIV; Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage). Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (children and family life). Ingraham v. Wright, 430 U.S. 651, 673 (1977) ("judicial relief for unjustified intrusions on personal security.") As the concurring opinion of Justice O'Connor (4 justices concurring) in

Mills v. Habluetzel, 102 S Ct 1549, 1556-1557 (1982) noted, the support of children is a strong interest countervailing state "purpose". These interests surely weigh heavily against any rationality which might be claimed for the Ohio immunity scheme.

Since the State and Appellee advance no argument of purpose, the equal protection test requiring that the scheme bear at least a rational relationship to a valid purpose is not met in this cause. Zobel v. Williams, 102 S.Ct 2309 (1982), clearly requires the State purpose to be evaluated on a rationality standard. The failure to offer even a minimal excuse for this arbitrary classification jeopardizes the continued application of equal protection of the laws. This Court should not permit State courts to evade equal protection challenges with perfunctory opinions that no debatable question is presented, see McDermott v. Irwin, supra, and without even exploring the purpose of the law and the rationality of the

classification in light of this purpose. Such a result is judicial abdication to legislative judgment which falls unequally upon persons, to their great injury. Since this Court recognizes that "rationality" includes a showing of substantial relationship, the total lack of articulated purposes precludes a finding of relationship and therefore of rationality. See Mills v. Habluetzel, 102 S Ct 1549 (1982)(Rehnquist J, plurality opinion for Court).

Unless this Court requires States to consider the claims advanced upon equal protection grounds by at a minimum requiring articulation of statutory purpose in retaining archaic immunities which deny citizens the right to protect fundamental or legitimate interests, the guarantee of the Fourteenth Amendment becomes a hollow travesty.

Ohio has never even considered what the purpose of Section 701.02 is, and whether or not that purpose is rationally related to isolating a person in Appellant's position from the protections

of the courts. This Court should entertain this appeal on the merits to insure that equal protection is a viable right rather than an illusion to be shattered by state courts and legislatures without thought or reason.

II. THIS COURT'S REVIEW OF OHIO'S FAILURE TO PROVIDE ANY REMEDY TO THE VICTIMS OF ITS OFFICERS NEGLIGENCE WHICH DIRECTLY CAUSED THEM GREAT HARM IS REQUIRED TO INSURE THAT OHIO ACCORDS THESE APPELLANTS DUE PROCESS OF LAW

When the circumstances of this case were before the Court previously, appellants requested a writ of certiorari issue to determine whether the reckless killing of Glen Hamilton by the appellee gave rise to a cause of action under 42 U.S.C. §1983. This Court refused to grant the petition and let stand a Sixth Circuit Court of Appeals ruling that appellants had failed to state a claim upon which relief could be granted. During the same term, the Court decided Parratt v. Taylor, 451 U.S. 527 (1981), which presented, inter alia, the same issue.

In Parratt the majority found that upon a

review of the totality of the state's actions surrounding the negligent taking of property, the requisites for due process were satisfied and, thus, there was no cause of action under §1983. Specifically, the Court found that where negligence was the cause of the deprivation of property by the state, and thus no pre-deprivation remedy was practicable, a post-deprivation remedy provided by the state was sufficient to accord the citizen due process of law. At the same time, some members of the Court expressed their reluctance to allow intrastate tort actions to become a federal concern suggesting that the fashioning of a remedy for such state inflicted injury should be a matter for the states.

In light of these expressions by the Court and the subsequent developments in this case outlined above, appellants are compelled to petition this Court again. A review of the totality of the state's actions in this case evidences an absence of any due process accorded Ethel Hamil-

ton and her children. Not only has the state through its officer, Wilford Stover, directly and negligently taken the life of Glen Hamilton, but through legislative enactment, Ohio has provided the officer with an absolute immunity from suit and deprived the appellants of any possible redress for the wrongdoing.

Ohio Revised Code Section 701.02 provides absolute immunity to the officer in this case regardless of how recklessly he may have driven. Yet Ohio also admonishes law officers on emergency calls to obey speed limits, traffic warnings and to operate their vehicles with due regard for the safety of others using the highways. Ohio Revised Code Sections 4511.03, 4511.24, and 4511.45.

Section 701.02 has been upheld by the Ohio Supreme Court in Agnew v. Porter, 23 Ohio St. 2d 18 (1970) and McDermott v. Irwin, 148 Ohio St. 67 (1947) and the courts felt compelled to follow those decisions. The Ohio Supreme Court

refused to review it upon appellants' request. These holdings below indicate that Ohio will apply the statute even to the most egregious situations. It has therefore licensed even gross and wanton negligence and left its victims without remedy. Unlike Nebraska in Parratt, Ohio has refused to provide the process due its citizens.

We remind the Court of the importance the right to access to the courts has been accorded in constitutional analysis. Boddie v. Connecticut, 401 U.S. 371 (1971). As we have stated before, under the common law, a police officer was liable to persons who were injured as a result of his negligent actions performed in the course of his employment. Lingo v. Hoekstra (1964), 176 Ohio St. 417, 200 NE 2d 325; United States Fidelity & Guarantee Co. v. Samuels (1927) 116 Ohio St. 586, 157 NE 325. The State legislature through R.C. 701.02 has abrogated that right in derogation of the common law and left no remedy to the person injured by the municipal police

officer (at the same time permitting a remedy if the police officer happens to be a county or state officer).

This denial of any process at all for the vindication of great loss can only be described as arbitrary and the antithesis of our concepts of the fundamental fairness due to citizens by the states where they reside.

Appellants therefore request the Court grant their appeal and determine whether the State of Ohio can through the actions of one of its officers directly and negligently take the life of their husband and father and at the same time deny to them any remedy for their loss.

Respectfully submitted,

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Attorneys for Appellants

APPENDIX A

IN THE COURT OF APPEALS
FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WILFORD C. STOVER	:	
	:	
Plaintiff-Appellee	:	
	:	
vs.	:	JUDGMENT ENTRY
	:	
ETHEL HAMILTON Administratrix, etc.,	:	
	:	
Defendant-Appellant	:	CASE NO. CA-2056

For the reasons stated in the Memorandum-Opinion on file, the sole Assignment of Error is overruled and the summary judgment of the Richland County Court of Common Pleas is affirmed.

_____

_____

_____
JUDGES

IN THE COURT OF APPEALS
FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WILFORD C. STOVER,	: JUDGES:
	: Hon. Robert E. Hender-
Plaintiff-Appellee	: son, P.J.
	: Hon. Norman J. Putman,
vs.	: J.
	: Hon. John R. Milligan,
ETHEL HAMILTON	: J.
Administratrix, etc.,	:
	: O P I N I O N
Defendant-Appellant:	
	Case No. CA-2056
	Decided:_____

APPEARANCES:

WILLIAM A. CALHOUN
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ATTORNEY FOR DEFENDANT-APPELLANT

MILLIGAN, J.

Police officer immunity.

The Richland County Court of Common Pleas dismissed the personal injury counterclaim for wrongful death of the Administratrix of the estate of Glen Hamilton against the plaintiff, Wilford C. Stover, a municipal police officer, in summary judgment proceedings.

Plaintiff's complaint was previously dismissed with prejudice, the judgment reciting that the parties had advised "the court that a compromise has been reached upon the Complaint filed herein."

The defendant, cross-complaining appellant, assigns a single error:

> THE COURT OF COMMON PLEAS ERRED IN GRANTING THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING THE ACTION. THE TRIAL COURT INCORRECTLY HELD THAT PART OF R.C. SECTION 701.02 APPLIES IN THIS CASE AND PROVIDES THE APPELLEE WITH IMMUNITY FROM SUIT. ALTERNATIVELY, IF THE

COURT OF COMMON PLEAS WAS CORRECT IN HOLDING THAT PART OF R.C. 701.02 APPLIES IN THIS CASE, THEN THE COURT ERRED IN FAILING TO HOLD THAT AS APPLIED TO THIS CASE, R.C. 701.02 IS UNCONSTITUTIONAL.

We incorporate the explanatory summary judgment upon which this appeal is based.

The facts are not in dispute as material to the question of law raised and resolved in the summary judgment proceedings.

Stover was one of two police officers in a cruiser in the Village of Plymouth, at all times relevant. The patrolman in the other cruiser, after investigating a matter at the Plymouth American Legion, drove his cruiser toward the south end of Plymouth in search of a vehicle identified as having been involved at the American Legion. When the other officer found nothing unusual, he followed the usual practice of turning around his cruiser outside of the Village of Plymouth, approximately three-fourths of a mile beyond the city limits at a convenient turn-

around. While outside the city limits, he observed an automobile several hundred feet off the road in a field and on fire. He thereupon called the cruiser driven by plaintiff-appellee for help, indicating that he did not know whether the vehicle was occupied. Stover responded that he was "enroute" and proceeded toward the area outside the municipal limits.

Defendant's decedent and Stover were headed south on Trux Street in Plymouth. The collision occurred when Stover, operating southbound in the northbound lane, struck the defendant's decedent as his car entered the driveway to the east of the road. At no time did Stover drive his cruiser outside the village limits; the accident happened within the city; and the officer, Stover, was answering an emergency call issued from outside the village limits; the emergency itself existed outside the village limits.

There was no formal agreement by which the

village police department answered calls or provided services outside the village limits, but by long-standing custom and practice, they would do so when requested so to do by other law enforcement agencies, generally providing only such service as was necessary until the sheriff or highway patrol arrived.

In addition to being a Plymouth law enforcement officer, Stover, along with other village officers, was also a deputy sheriff.

The issue is singular and unequivocal:

Do the immunity provisions of R.C. 701.02 protect Stover from personal liability as a matter of law?

In addition to the provisions providing a municipal corporation with a governmental function defense for negligence of members of the police and fire department while responding to emergency calls, the Code provides:

"Policeman shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call."

R.C. Section 701.02.

Legislative provisions granting immunity to police and fire officers responding to emergency calls create an exception to the common law. Lingo v. Hoekstra, 176 Ohio St. 417, 200 N.E. 1d 325 (1964).

Appellant claims that the immunity statute is inapplicable for two reasons:

1. It is inapplicable upon the peculiar facts of this case, and
2. As applied to these facts, it is unconstitutional.

In support of her claim that the mission of the officer was beyond his authority, she cites the Ohio Constitution, the source of any municipal power:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." (Emphasis added)
>
> Article XVIII, Section 3.

See also Beachwood v. Board of Elections, 167 Ohio St. 369, 148 N.E. 2d 921 (1958).

Three sections of the Municipal Corporations Act deal with extra territorial authority of police officers, (1) R.C. Section 715.50 deals with police jurisdiction on municipally-owned or used property outside the municipal corporation; (2) R.C. Section 737.04 allows intermunicipal corporate contracts for police protection; and (3) R.C. Section 737.10 provides that police officers may be called from one municipal corporation to another by act of the mayor or other chief executive. Appellant argues that the failure of the legislature to deal with the circumstances created by the facts of this case suggest that the immunity provisions

of R.C. Section 701.02 do not apply.

Further, R.C. Section 2935.03, the "hot pursuit" provision, suggests that the legislature recognizes the need for legislative authority when the officer or the emergency act takes place beyond the municipal corporate line. Appellant buttresses these arguments by the recognized proposition of law that where a statute is in derogation of the common law, it must be strictly construed. 50 Ohio Jur. 2d, Statutes, Section 284. Thus, appellant takes comfort in an unreported recent decision from the First Appellate District of Ohio wherein the court concluded that a "volunteer fireman" was not protected by the provisions of R.C. Section 701.02. Dougherty v. Torrence, Hamilton Cty. Court of Appeals, Unreported, Case No. C-800799-May 13, 1982.

Notwithstanding the arguments tendered by the appellant, we conclude that the trial court correctly applied the law as enunciated by the Ohio Supreme Court in a case arising out of this

appellate district over ten years ago. Particularly applicable to the single unique characteristic of the facts in this case is the following statement:

> "Such policeman [responding to an emergency call] is entitled, as a matter of law, to accept the call at face value and has no duty to independently determine whether an actual emergency exists, or to question the judgment of the officer issuing such message."
>
> Agnew v. Porter, 23 Ohio St. 2d 18, 52 O.O. 2d 79 (1970), syllabus 2.

In Agnew, the Supreme Court approves the statement of this court:

> "If it is unwise or unfair to load the economic burden of the damage done by this policy upon the innocent users of the highway, the governmental power to change the policy remains in the hands of the legislature where the immunity was created."

Appellant cites no authority for his novel theory that even if the municipal police officer's

immunity applies, the appellee may be sued in his other capacity as a deputy sheriff. We reject that argument.

Finally, appellant argues that this section, insofar as it applies to these parties upon these facts, is unconstitutional.

Appellant states:

> "R.C. Section 701.02 as applied in this case denies Mrs. Hamilton and her children equal protection of the law as guaranteed by the Ohio Constitution and the United States Constitution."

Appellant passionately argues that the creation of a small class who suffer the different consequences because of the application of this statute is "terribly cruel,...certainly contrary to our judicial heritage which has recognized over the centuries the importance of remedy in the courts for tortious actions." She argues that there is no such compelling state interest as justifies the creation of this special class.

Tangentially, appellant argues that:

> "R.C. Section 701.02, as applied in this case, denies Mrs. Hamilton and her children due process of law as guaranteed by the Ohio and United States Constitutions."

Appellant draws an analogy to the recent action of the Ohio Supreme Court in finding Ohio's guest statute violative of due process. See Primes v. Tyler, 43 Ohio St. 2d 195, 71 O.O. 2d 183, 331 N.E. 2d 723 (1975).

Appellant's final constitutional argument is:

> "R.C. Section 701.02, as applied in this case, denies Mrs. Hamilton and her children their right to pursue a wrongful death action as guaranteed by the Ohio Constitution." (Article I, Section 19(a), Ohio Constitution.)

As it relates to all of the above constitutional arguments, we are compelled by the holding of the Supreme Court in McDermott v. Irwin, 148

Ohio St. 67, 73 N.E. 2d 85 (1947), to conclude that Section 701.02 is a constitutional exercise of the legislative authority. As noted by the trial court in the instant case:

> "This court also believes that if any change of policy relating to immunity is to be made, it ought to take place in the Ohio legislature where the immunity was created."

Upon the authority of McDermott, supra, and Agnew, Supra, we overrule the Assignment of Error and affirm the summary judgment of the Richland County Court of Common Pleas.

Henderson, P.J., and

Putman, J., concur

_____

_____

_____

JUDGES

APPENDIX B

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1983 TERM
)
City of Columbus.) To wit: January 26, 1983

Wilford C. Stover, : No. 82-1744

Appellee, :APPEAL FROM THE COURT OF APPEALS

vs. :

Ethel Hamilton Admrx., : for Richland County

Appellant. :

This cause, here on appeal as of right from the Court of Appeals for Richland County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of Court of Appeals for Richland County for entry.

I, James Wm. Kelly, Clerk of the Supreme

Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____day of _____19_____

_____Clerk

_____Deputy

APPENDIX C

THE SUPREME COURT OF OHIO

THE STATE OF OHIO)
)
City of Columbus.)

1983 TERM

To wit: January 26, 1983

Wilford C. Stover, : No. 82-1744

Appellee, :MOTION FOR AN ORDER DIRECTING THE COURT OF

vs. :APPEALS

Ethel Hamilton, Admrx., : for Richland County

Appellant. :TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Ben Sheerer

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____day of _____19____

APPENDIX D

IN THE COMMON PLEAS COURT
OF RICHLAND COUNTY, OHIO

Wilford C. Stover	:	Case No. 80-52-L
Plaintiff	:	
vs.	:	
Ethel Hamilton, Admrx., etc.	:	JUDGMENT ENTRY
Defendant	:	

This matter comes before the Court upon plaintiff's Motion for Summary Judgment, defendant's opposing Brief with affidavits, the pleadings and the law, the parties having waived oral arguments upon inquiry by the Court.

Upon a consideration of all the information contained in the case file, the Court is of the opinion that there exists no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

Reasonable minds can come to but one conclusion on the following statement of facts and that

conclusion under the state of the law in the State of Ohio is adverse to the defendants.

There can be no question that at the time of the incident in which Mr. Stover collided with the vehicle driven by the defendant's deceased husband, Mr. Stover was a duly appointed police officer acting in his official capacity. No question exists that at the time of the accident Mr. Stover was proceeding on an emergency run having been advised by another officer that an automobile, possibly occupied, was on fire and that his help was needed immediately.

The last paragraph of §701.02 Ohio Revised Code states, "Policemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call." Agnew v. Porter, 23 Ohio State 2d 18 (1970), is representative of the statements made by the Ohio Supreme Court in cases involving injuries or death occasioned by

negligence of police officers while responding to a legitimate emergency call. The Court states in Agnew v. Porter, supra, that §701.02 of the Revised Code "is a full defense to an action for damages for personal injury against a policeman for negligence while engaged in the operation of a motor vehicle while responding to an emergency call...." and that a "policeman is entitled, as a matter of law, to accept the call (from fellow officer or dispatcher) at face value and has no duty to independently determine whether an actual emergency exists...."

Defendant suggests compelling reasons why she should not be left without recourse to the Courts for her tremendous loss. This Court is in full agreement that the issue of a lack of fundamental fairness is raised by applying §701.02 Revised Code to situations such as the one before this Court.

As indicated by the attorney for the defendant in his brief, both the Ohio Legislature and

Ohio courts appear to be leaning away from immunities for otherwise tortious conduct. Reasonableness has long been a workable standard to determine the actionability of conduct. Such a standard or one based on gross negligence might well work as a viable exception to §701.02 Revised Code

This Court feels constrained to follow Agnew v. Porter, supra. This Court also believes that if any change of policy relating to immunity is to be made, it ought to take place in the Ohio Legislature where the immunity was created.

For the reasons stated above, plaintiff's motion is hereby sustained and the within action is hereby dismissed with costs taxes against deposits.

JAMES D. HENSON, JUDGE

APPENDIX E

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WILFORD C. STOVER	:	CASE NO. CA-2056
Plaintiff-Appellee	:	
vs.	:	
ETHEL HAMILTON Administratrix etc, etal.	:	NOTICE OF APPEAL
Defendants-Appellants	:	

Notice is hereby given that Ethel Hamilton, Administratrix, etal., the appellants above named hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of Richland County, Ohio affirming the summary judgment granted against appellants entered on the 15th day of October, 1982. The Ohio Supreme Court declined to review this judgment on January 26, 1983. This appeal is taken pursuant to 28 USC §1257.

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(216) 241-3646
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that on the 14 day of April, 1983, a copy of this Notice was deposited in the United States mail box with first class postage prepaid to William A. Calhoun, Six West Third Street, Suite 200, Mansfield, Ohio 44902, Attorney for appellee.

BEN SHEERER
614 Superior West
Suite 611
Cleveland, Ohio 44113
(216) 241-3646
Attorney for Appellants

Filed:
April 15, 1983

82-1747

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

ETHEL HAMILTON, ET AL.

Appellants

vs.

WILFORD STOVER

Appellee

MOTION TO DISMISS

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QUESTION PRESENTED

Appellee accepts the Appellant's statement of the Question Presented.

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JURISDICTION

The Appellee accepts the Statement of Jurisdiction as presented by the Appellants.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

FOURTEENTH AMENDMENT (in pertinent part):

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code Section R.C. 701.02 (in pertinent part):

> Policemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call.

STATEMENT OF THE CASE

The Appellee accepts the Appellants' Statement of the Case except in the following particulars:

The Appellants' decedent, Glen Hamilton, had been followed for some distance by the municipal police cruiser driven by Wilford Stover. While following Glen Hamilton, Wilford Stover had his siren blowing and all emergency lights activated. Instead of the Appellants' decendent pulling to the right side of the road and stopping, he made a left-hand turn into his residence as the police cruiser was passing him, resulting in a collision causing the death of the Appellants' decendent. All facts indicate that the Appellee, Wilford Stover, was responding to an emergency call from another village policeman.

REASONS REQUIRING DISMISSAL OF APPELLANTS' APPEAL

A REASONABLE PUBLIC POLICY EXISTS FOR THE DOCTRINE OF SOVEREIGN IMMUNITY WHICH HAS BEEN ADDRESSED BY THIS COURT ON SO MANY OCCASSIONS, ITS BASIS NEEDS NO FURTHER REVIEW AND, THEREFORE, PRESENTS NO SUBSTANTIAL QUESTION.

The Appellant seeks to achieve by judicial fiat the elimination of the concept of sovereign immunity of a state or municipality from suit in its own Court when, in fact, Federal and state legislation, as well as established case law, recognize its existence and leave to legislative determination the extent to which the state may decide to waive the immunity which it has, see Nevada v. Hall, 440 U.S. 410 (1979). In this case, the State of Ohio has determined not to waive sovereign immunity for municipal police officers on an emgergency call. Such a legislative determination represents a reasonable conside-

ration for the need to supply protection to persons and property within a municipality without an officer having to fear that his discretionary judgment may create personal liability.

Historically, it was argued by Hamilton in The Federalist No. 81, at 567 (Dawson ed. 1837) that:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and general practice of mankind in the exemption as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states and the danger intimated must be merely ideal.

The case of Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), however, determined that in spite of Hamilton's assertion, a state was liable to be sued by a citizen of another state or of a foreign country. This resulted in the passage

of the Eleventh Amendment which provided that:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.

Subsequent to the passage of the Eleventh Amendment, in the case of Hans v. Louisiana, 134 U.S. 1 (1890), the Appellant attempted to argue that the Eleventh Amendment spoke only of suits by citizens of other states against the state and thereby did not prohibit a suit by a citizen of his own state against that particular state. The Court in addressing this issue, held:

> It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that when the Eleventh Amendment was adopted it was understood to be left open for

> citizens of a State to sue their own State in the federal courts whilst the idea of suits by citizens of other States or of foreign states was indignantly repelled? Suppose that Congress when proposing the Eleventh Amendment had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: Can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.

A direct suit by a citizen of the state of Arkansas brought in that state to recover interest due on certain bonds issued by the state was dismissed for failure of the plaintiff to attach the bond to his complaint as was required by statute passed by the state of Arkansas subsequent to the filing of the complaint. On appeal to the Supreme Court, through Chief Justice Taney held:

> It is an established principal of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts or in any other without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be a defendant in a suit by individuals or by another state and as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued and the manner in which the suit shall be conducted and may withdraw its consent whenever it may suppose that justice to the public requires it. Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1858). See also Nevada v. Hall, supra.

It is well settled that the immunity accorded to the several states, if they so desire to exercise it, cannot be circumvented by an action against an officer of that state who professes to act in obedience or enforcement of those laws, see Louisiana v. Jumel, 107 U.S. 711 (1883); Hagood v. Southern, 117 U.S. 52 (1886); Ex Parte Ayers, 123 U.S.

443 (1887). Additionally, it has been well recognized that an officer of the state while acting in his official capacity, will not be held liable for his action or nonaction where it involves the exercise of discretion and is not merely ministerial, see Bradley v. Fisher, 80 U.S. 335 (1872).

The police officer Appellee, as an employee of the village under the circumstances and facts of this case, is in a unique position since he must bear alone the full weight of the losses he causes unless provision is made to protect him by insurance or the state, by gratuity, determines to reimburse him for his loss. Professor Robson basically sumarized this situation of state immunity coupled with officer liability in the following words:

> The liability of the individual official for wrongdoing

> committed in the course of his duty on which so much praise has been bestowed by English writers is essentially a relic from past centuries when government was in the hands of a few prominent, independent and substantial persons so-called Public Officers who were in no way responsible to to ministers or elected legislatures or counsels. ... Such a doctrine is utterly unsuited to the 20th Century state in which the public officer has been superseded by armies of anonimous and obscure civil servants acting directly under the orders of their superiors who are ultimately responsible to an elected body. The exclusive liability of the individual officer is a doctrine typical of a highly individual common law, it is of decreasing value today. Robson, Report of the Committee on Ministers Powers, 3 Pol. Sci. Q. 346, 357-358 (1932).

The recognition of the immunity of the state and its officers is best exemplified on a Federal level in the Federal Tort Claims Act, 28 U.S.C., §1291, 1346, 1402, 1504, 2110, 2401, 2402, 2671, et. seq. This Act basically

recognized the need of the Federal government to waive sovereign immunity from suit for certain specified torts of Federal employees. It, however, did not insure injured persons damages for all injuries caused by such employees. Similarly, Ohio has by Ohio Revised Code §701.02 refused to waive immunity of its municipalities and certain officers acting on their behalf during certain emergency situations. On the Federal level, in the case of Dalehite v. United States, 346 U.S. 15 (1953), the Court noted in finding that there was no remedy for the plaintiffs under the Federal Torts Claim Act stated that:

> The legislative history indicates that while Congress desired to waive the Government's immunity from actions for injuries to persons and property occassioned by the tortuous conduct of its agents acting within their scope of business, it was not contemplated that the Government

> should be subject to liability arising from acts of a governmental nature or function. [P. 27, 28]

In analyzing the concept of liability, the Court indicated that the basis for the interpretation of the Federal Tort Claims Act and its reasoning in analyzing that Act should start from the accepted jurisprudential principal that no action lies against the United States unless the Legislature has authorized it. Dalehite v. the United States, supra., 30.

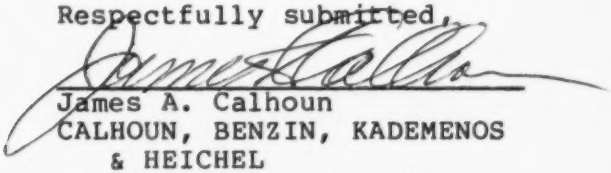
It is interesting to note that one of the allegations of the plaintiffs in Dalehite, supra., was that the government was negligent in its failure to properly fight the fire which errupted as a result of the explosion of the fertilizer cargo. In addressing itself to that issue, the Court noted:

> It [The Federal Tort Claims Act] did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights...[In] fact, if anything is doctrinally sanctioned in the law of torts, it is the immunity of communities and other public bodies for injuries due to fighting fire...that cities by maintaining firefighting organizations assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. [pp. 43, 44].

Appellee, therefore, requests that the Court dismiss the Appellants' appeal for the reason that the Ohio statute represents a nonwaiver of immunity which is accorded to the state and its municipalities and its officers thereof for valid public policy reasons based on

sound prior judicial decisions and well recognized state and Federal legislation.

Respectfully submitted,



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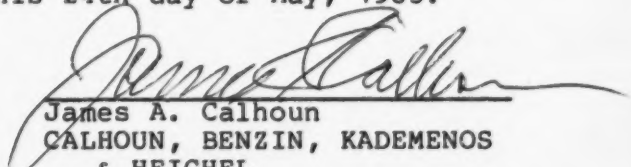
CERTIFICATION

The undersigned hereby certifies that a copy of the foregoing Motion to Dismiss was served upon Benjamin B. Sheerer, Paula Goodwin and Elizabeth Reilly, Attorneys for Appellants, at 614 Superior Avenue, West, Suite 611, Cleveland, Ohio, 44113, by U.S. ordinary mail on this 24th day of May, 1983.



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